U.S. Department of Homeland Security
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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

B5

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 21 2006

EAC 03 218 51458

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as an instructor. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO concurred.

Counsel has now filed a motion to reconsider. According to the regulation at 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy.

At the outset, counsel relates his recollections of a phone call with the Chief of this office, asserting that it was agreed that "unless there is an obvious reason to deny a case, it should be approved." This principle does not change the fact, supported by statute, that the burden of proof of establishing eligibility is on the petitioner. Section 291 of the Act. This section of law goes on to assert that the evidence must establish eligibility "to the satisfaction" of the adjudicating officer. This burden is confirmed in *Matter of Soo Hoo,* 11 I&N Dec. 151 (BIA 1965) and *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). We reject any implication that the act of submitting evidence shifts the burden of proof to CIS. Rather, that evidence must be evaluated to determine whether the petitioner has met his burden.

Counsel's brief includes numerous assertions that relate to the AAO's decision on a petition filed by the petitioner in another classification. Those assertions need not be addressed in this decision. We will address counsel's remaining assertions below.

The relevant law was quoted in our previous decision and need not be repeated here. The sole issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The controlling precedent is *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215 (Comm. 1998), which has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to

a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

As stated in our previous decision, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

At the outset, it is useful to address the issue of "exceptional ability." On motion, counsel states:

> Trying to make the case that a scientist whose first publication was in 1989 who now has 37 articles and 13 presentations, who is not a postdoc, but and [sic] INSTRUCTOR (faculty) at the University of Connecticut, is not even "exceptional" is an exercise in sophistry.

Section 203(b)(2) includes both aliens of exceptional ability and professionals with advanced degrees within a single preference classification. Both aliens of exceptional ability and advanced degree professionals must normally obtain an alien employment certification certified by the Department of Labor. That requirement can be waived in the national interest. Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing *significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."]* The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

(Emphasis added.) In addition, *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 222, explicitly states that exceptional ability, by itself, does not justify a waiver of the alien employment certification requirement.

The AAO acknowledged that the petitioner is an advanced degree professional. Thus, the issue of whether the petitioner might also qualify as an alien of exceptional ability by meeting three of the six regulatory criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii) is moot. The AAO's decision did not reach the issue of exceptional ability one way or the other and we find no need to address the issue now.

Regarding the national interest waiver, the AAO concurred with the director that the petitioner works in an area of intrinsic merit, Nuclear Magnetic Resonance (NMR) spectroscopy, and that the proposed benefits of his work, improved understanding of macromolecules implicated in cancer and AIDS, would be national in scope. The only issue in contention is whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The petitioner obtained a degree in physics from Mechnikov State University in 1981. In 1995, the petitioner obtained his Candidate of Science diploma from the Bogatsky Institute. On the Form ETA-750B, the petitioner listed his field of study as bioorganic chemistry. The petitioner worked for the Bogatsky Institute until 1998, when he went to work as a postdoctoral research fellow at the Institute of Biomedical Sciences in Taipei, Taiwan. In 2001, the petitioner accepted another postdoctoral position at the University of Connecticut Health Center where he was promoted to an instructor in February 2003. The petitioner remained in that position at the time of filing.

The AAO acknowledged that two of the petitioner's six reference letters were from independent researchers but noted that the content of the letters was as important as the source. The AAO then exhaustively discussed the letters.

On motion, counsel asserts that the AAO's discussion of the letter from [redacted] the petitioner's collaborator at Bogatsky Institute, reflects a lack of ability to read "English for comprehension." The AAO stated:

> the petitioner's collaborator at the Bogatsky Institute, attests to the petitioner's skill and creativity. He asserts that the petitioner developed "new NMR methods, experimental techniques and the research methodology" and "provided a number of improvements for the methodology and instrumentation." More specifically, [redacted] asserts that the petitioner's work with bioactive organic compounds and supramolecular complexes resulted in the identification of "the bioactive confirmation of neuropeptides toward the drug discovery." The petitioner "contributed substantially to the fundamental understanding of the receptor recognition of peptide hormones and neurotransmitters and has contributed to the novel and more effective neurotropic medicine substances." [redacted] does not identify any medicines developed based on the petitioner's work. The record does not include a letter from any Ukrainian pharmaceutical companies attesting to their reliance on the petitioner's work.

On motion, counsel responds that [redacted] "never said that the petitioner developed drugs, but rather methods that could be used to develop drugs." Counsel's distinction is not persuasive. The AAO did not challenge the lack of evidence that the petitioner had ever *developed* a drug for a pharmaceutical company, but that the record lacked evidence that pharmaceutical companies, which do develop new drugs, had relied on his methods. We stand by our initial assertion that an influential researcher who

researches "methods that could be used to develop drugs" should be able to at least demonstrate some interest from pharmaceutical companies in relying on his *methods* in their own work.

Counsel's assertions regarding the AAO's discussion of the remaining letters are limited to procedural concerns. Specifically, counsel asserts that the AAO's identification of the type of evidence that might support the claims in those letters but is lacking in this matter constitutes an impermissible request for additional evidence at the appellate stage. We disagree. By filing the appeal, the petitioner requested a higher level of review of the record of proceeding. In its appellate level review, the AAO typically provides a more in-depth analysis of deficiencies raised by the director, either affirming or rejecting the director's concerns. In this matter, the director concluded that the record lacked evidence of the petitioner's recognition outside his immediate circle of colleagues. The AAO merely expanded on this conclusion. Specifically, relying extensively on language directly from *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 219, n.6, the AAO noted the lack of evidence that the petitioner's work had influenced the work of independent researchers in the field.

Regardless, even if the AAO had identified a new deficiency on appeal, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In addition to discussing the letters, the AAO also discussed counsel's initial assertion that in 1998, the petitioner received the "International Renaissance Foundation – Open Society Institute (New York) Award [redacted]" Counsel characterized this award as "a highly competitive international award with a significant monetary stipend attached to it." The AAO correctly noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On appeal, counsel accused the director of ignoring "a highly competitive international award with a significant monetary stipend" funded by [redacted] Subsequently, counsel referenced this "award" as a "fellowship" and in his conclusion he asserted that the "stipend" was $3,200. The AAO found the evidence submitted in support of counsel's assertion, including an uncertified partial translation, did not include any information as to the size of the stipend or its significance. The AAO further noted that recognition for achievements or significant contributions is one criterion for aliens of exceptional ability, a classification that normally requires an alien employment certification.

On motion, counsel completely mischaracterizes the AAO's concern regarding the amount of the stipend and confuses the AAO's concern with the lack of a full translation of the "award" letter with an irrelevant discussion of whether translations of foreign language articles are required. The AAO did not, as strongly implied by counsel on motion, question whether the amount of the "award," claimed by counsel to be $3,200, was significant. Rather, the AAO noted that the only evidence of

the amount was counsel's own statement. We reaffirm that the assertions of counsel are not evidence. *Id.*

Counsel acknowledges on motion that the regulation at 8 C.F.R. § 103.2(b)(3) applies to foreign language documents submitted as evidence of the truth of what is stated, which is exactly the purpose of the "award" letter. Despite this concession, counsel still attempts to fault the AAO by changing the nature of the translations found lacking from the "award" letter to published articles. Based on this disingenuous analysis, counsel concludes that the AAO "does not understand the law." The AAO, however, did not state or imply that translations for the published articles were necessary or lacking. We affirm our contention that the regulation requires a full, certified translation of the "award" letter if the content of that letter is to be considered evidence. The record still lacks such a translation.

Finally, the AAO concluded that the petitioner's publication record, while indicative of a prolific researcher, falls short of establishing his influence in the field. As quoted by counsel, the AAO stated:

> Counsel initially asserted that the petitioner had authored 36 published articles and presented his work at 10 international conferences. The record contains two abstracts and 16 articles. We will not presume the influence of an article from the journal in which it appears. Rather, we look for evidence of the impact of the individual article itself, such as evidence that it is widely cited. The record contains no evidence that the petitioner's work has been cited by other research teams, in review articles or in commentaries.

On motion, counsel asserts that most of the petitioner's articles were published in the Soviet Union and "it is quite impossible to get either copies of most of them or citations to them." The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2). Moreover, the petitioner has several articles published in the United States prior to the date of filing and has not submitted any evidence that those articles had been cited.

As stated in our previous decision, the record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. Nothing provided in counsel's brief on motion, however, changes our determination that the record does not establish that the petitioner's work advanced NMR spectrometry such that it can be viewed as having influenced the field as a whole.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not

established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The AAO's decision of July 18, 2005 is affirmed. The petition is denied.